

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SALVADOR MARTINEZ**

Claimant

VS.

**CARGILL MEAT SOLUTIONS CORPORATION**

Self-Insured Respondent

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Docket No. 1,027,952

**ORDER**

Respondent appeals the February 17, 2010, Award of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was found to have suffered a 95 percent loss of use of the left forearm from an amputation injury suffered on June 23, 2004.<sup>1</sup> In addition to the claim for the amputation, claimant has filed a new accident claim alleging a series of injuries to his upper extremities, neck and upper back with an accident date from January 19, 2005, forward. This claim was assigned Docket No. 1,027,953. The ALJ issued separate Awards in these two dockets, and the Board will do likewise.

Claimant appeared by his attorney, Chris A. Clements of Wichita, Kansas. The self-Insured respondent appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on June 2, 2010.

**ISSUES**

1. What is the nature and extent of claimant's injury and disability from the accident on June 23, 2004? The parties stipulated at oral argument to the Board that claimant has a 95 percent functional impairment to his left upper extremity. A dispute centers around the level of impairment, either above or below the elbow.

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<sup>1</sup> Although claimant's amputation was below the elbow, no physician was asked to provide a rating to the level of the forearm. All of the ratings were to the upper extremity.

2. Does the \$50,000.00 cap contained in K.S.A. 44-510f(a)(4) apply to this matter? Claimant cites *Roberts*<sup>2</sup> in support of his argument that the cap does not apply as claimant missed more than one week of work due to the accident. Respondent argues that the temporary total disability compensation (TTD) was paid as part of the healing period and the limitations of *Roberts* do not apply to this case.

### FINDINGS OF FACT

Claimant, a working supervisor, had worked for respondent for 11 years. On June 23, 2004, while he was working on "high line 2", claimant's left arm became entangled in a chain which pulled his arm into a machine, breaking his arm between his wrist and elbow. Claimant was taken to the hospital by ambulance and later transferred to St. Luke's Medical Center in Denver, Colorado. It was determined that the arm was too badly damaged to save and claimant underwent an amputation of his left arm approximately 3 to 4 inches below his elbow. Claimant was off work for almost four weeks, returning to light duty in the yard for two to three weeks. Claimant was then returned to his job on the "high line 2" as a supervisor. After about a year, claimant transferred to a supervisor's job in the area called "case ready Wal-Mart". Claimant remained at that position at the time of the regular hearing.

The transfer from "high line 2" to "case ready Wal-Mart" occurred after claimant began experiencing pain in his shoulders. Claimant's job on "case ready Wal-Mart" required that he supervise only, most of the time. However, if claimant's crew was short handed, he would then become a worker on the line. The "high line 2" job was more physical than the "case ready Wal-Mart" position because it required operating more equipment, and using knives and hooks to perform the work.

After the initial amputation surgery, claimant underwent two more irrigation and debridement procedures to the left forearm. Claimant later returned to Denver to have his prosthetic left arm fitted. After the initial surgery, claimant returned to Dodge City and came under the care of Dr. Shah. At some point, claimant began experiencing left shoulder pain with a possible diagnosis of bicipital tenosynovitis. Claimant was placed on Celebrex and his exercises to the left shoulder were reduced. Claimant also underwent a period of psychotherapy and was taking antidepressants. This treatment proved successful. Claimant displayed good range of motion in the left elbow and shoulder. The September 11, 2009, report of board certified orthopedic surgeon John P. Estivo, D.O., discussed a rating from Dr. Shah to claimant's left upper extremity of 95 percent.

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<sup>2</sup> *Roberts v. Midwest Mineral, Inc.*, 41 Kan. App. 2d 603, 204 P.3d 1177, *pet. for rev. pending* (2009).

By January 19, 2005, claimant was experiencing pain in both shoulders, with the pain in the right shoulder being the worst. The pain in his left shoulder went to his elbow. Claimant returned to Dr. Shah and indicated that he had been using his prosthetic left arm. Claimant had shoulder pain with range of motion bilaterally. X-rays indicated possible impingement syndrome of both shoulders, possibly from overuse, and possible hypertrophy of the rotator cuffs causing some bursitis. Cortisone injections to both shoulders were administered, and claimant was again placed on Celebrex. Claimant's pain complaints extended into the neck and radiated down his right forearm. Claimant also experienced pain in his right hand and underwent injections in the fingers of the right hand and one injection in his right elbow. Claimant testified that the use of the prosthetic arm when working caused him pain in the left elbow and in his neck, extending down his right arm. Claimant acknowledged that he was having to use his right hand more since he underwent the amputation to his left arm. Claimant also testified that the amputation caused added stress on his left shoulder due to the need to compensate for the loss of his left arm.

Claimant was referred by his attorney to board certified rehabilitation and physical medicine specialist Pedro A. Murati, M.D., for an initial examination on June 6, 2006. Dr. Murati determined that claimant was experiencing a cause-and-effect relationship between the amputation of the left arm and the subsequent injuries to his upper extremities, neck and upper back. When asked, Dr. Murati was unable to state that "but for" the amputation, claimant would not have had the additional problems. But, he could state that the amputation did help make everything significantly worse. However, Dr. Murati also testified that the return to a job requiring repetitive activities would increase the likelihood that claimant would experience difficulty with his shoulders. The return to repetitive type duties would aggravate claimant's upper extremity conditions. Claimant was diagnosed with post amputation status, myofascial pain syndrome affecting the bilateral shoulder girdles and cervical paraspinals, right lateral epicondylitis, right carpal tunnel syndrome and right radial nerve entrapment at the elbow. Dr. Murati rated claimant at 95 percent impairment to the left upper extremity for the amputation, 5 percent whole person impairment for the myofascial pain syndrome affecting the cervical paraspinals, 10 percent impairment to the right upper extremity for the carpal tunnel syndrome, 10 percent impairment to the right upper extremity for the radial elbow entrapment, 3 percent impairment to the right upper extremity for the lateral epicondylitis, for a 21 percent right upper extremity impairment, which converts to a 13 percent whole person impairment. (It is noted that the 5 percent impairment for the cervical paraspinals myofascial pain syndrome appears to have been omitted when the numbers were combined in Dr. Murati's June 6, 2006, report.)

Dr. Murati next examined claimant on April 1, 2008. The diagnoses remained the same with the exception that myofascial pain syndrome affecting the thoracic paraspinals was added. The impairment ratings also remained the same with the exception that a 5 percent whole person impairment for the myofascial pain syndrome affecting the cervical paraspinals and a 5 percent whole person impairment for the myofascial pain syndrome affecting the thoracic paraspinals were added. The ultimate impairment calculated to a

21 percent whole person impairment with both the cervical and thoracic ratings included in the final calculation.

Claimant was referred by respondent to family and occupational medicine specialist Terry R. Hunsberger, D.O., on June 12, 2008. In his practice, Dr. Hunsberger sees patients at respondent's plant once per week, and has been doing so for four to five years. Claimant was diagnosed post amputation and also displayed upper extremity symptoms from repetitive activities on the job. Claimant had complaints in his upper extremities, his shoulders, his right elbow, his neck and his upper back. Dr. Hunsberger opined that claimant's upper extremity, neck and shoulder complaints would not have occurred "but for" the amputation of his left hand.<sup>3</sup> However, Dr. Hunsberger also acknowledged that the return to repetitive activities after the amputation injury contributed to claimant's conditions. He further defined his opinion in stating that the repetitive activities that claimant was performing since his injury probably caused the conditions claimant was experiencing.<sup>4</sup> Dr. Hunsberger discussed bilateral impingement and hypertrophied rotator cuffs with bursitis and myofascial pain syndrome. He provided no rating for claimant's conditions but did testify that the ratings should not be a body as a whole rating due to the fact that claimant's right shoulder was not injured at the same time as the left upper extremity.

Claimant was referred by respondent to board certified orthopedic surgeon John P. Estivo, D.O., for an evaluation on September 11, 2009. At the time of the evaluation, claimant was experiencing complaints to his right hand and right index finger with triggering in the finger. Claimant had no cervical pain, no radiating pain to the upper extremities, no left shoulder or elbow pain, no right elbow or wrist pain and no lumbar or thoracic pain. Dr. Estivo performed a series of tests on claimant, including a Spurling's test, all of which were normal. Claimant had a negative Tinel's test at the right elbow, had a negative Tinel's test at the right wrist and displayed no intrinsic muscle wasting to his right hand. Claimant had a full range of motion in the right hand, and testing for de Quervain's tenosynovitis was negative. Range of motion studies in the right and left shoulders, right elbow, lumbar spine and cervical spine were all normal. Dr. Estivo rated claimant at 95 percent to the left upper extremity for the amputation but provided no other impairment rating for claimant's other body parts. He did note that claimant's symptoms continued to increase as he continued to work. Dr. Estivo also acknowledged that his evaluation of claimant was drastically different from the evaluations performed over the past approximately four years by other medical providers.

Claimant came under the care of Ara Chitchyan, M.D., on January 13, 2009. Dr. Chitchyan is employed at Amputee Services of America in Denver, Colorado. He has been employed there since July 2008. He is not board certified, but is board

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<sup>3</sup> Hunsberger Depo. at 6-7.

<sup>4</sup> *Id.* at 14.

eligible and has completed the first stage of the certification in physical medicine and rehabilitation. Claimant presented with bilateral shoulder pain, right elbow pain, right hand pain and paresthesia in the right hand. Claimant brought several MRIs which covered claimant's bilateral shoulders and neck. Claimant was diagnosed with cervical spondylosis, showing significant progression between 2006 and 2008, myofascial pain syndrome for the cervical spine, right hand trigger finger and paresthesia in the right hand. Claimant was referred for physical therapy and, at one point, was referred for psychological counseling. Dr. Chitchyan opined that claimant's work was too hard for him and that claimant was working outside his restrictions due to pride in his job. Dr. Chitchyan was not under the impression that respondent was making claimant work outside his restrictions, only that claimant was choosing to do so. Regardless of why, claimant was working too hard and the aggravation was making his physical situation worse.

When Dr. Chitchyan examined claimant on September 29, 2009, he determined that claimant's condition continued to deteriorate, with pain in his right shoulder and hand. The worsening was accelerated as compared to a regular aging process. Dr. Chitchyan did not testify that claimant should not be a supervisor, only that he was performing duties which went beyond his duties as a supervisor. He performed no evaluation of the left upper extremity as claimant was still under the care of Dr. Meier. These repetitive activities were going to aggravate and accelerate claimant's conditions. Claimant had no complaints in his lumbar spine at the time of the examination. Dr. Chitchyan did not offer a rating under the *AMA Guides*.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>6</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>7</sup>

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<sup>5</sup> K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

<sup>6</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>7</sup> K.S.A. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”<sup>8</sup>

It is undisputed that claimant suffered a very traumatic injury on June 23, 2004, when his arm became entangled in a chain and drug through a piece of equipment. The resulting injury was so severe that claimant’s arm was amputated 3 to 4 inches below the elbow. The dispute in this instance centers around the location of the injury and disability and the limitations set forth in K.S.A. 44-510f(a)(4).

The location of the amputation is clearly in the forearm, below the left elbow. However, it is the situs of the disability which dictates the entitlement to an award. The situs of the injury is not always the same as the situs of the disability. In *Fogle*,<sup>9</sup> the claimant, a fireman, was injured when he fell, landing on his back. The claimant was wearing an air bottle strapped to his back. A nerve in the claimant’s spine was injured. But, the only disability the claimant suffered was to his left arm. The Supreme Court, in affirming the decision of the Kansas Court of Appeals, held that it is the situs of the resulting disability, not the situs of the trauma, which determines the level of workers compensation benefit. In *Bryant*,<sup>10</sup> the claimant cut her left arm near the crease of her elbow. The cut injured the brachial artery and resulting scar tissue developed flattening and trapping of the median nerve in the elbow area. Surgery released the nerve, and carpal tunnel surgery was performed at the same time. The entrapment and pressure on the median nerve caused the claimant to experience pain and numbness in her left arm and shooting pains up her arm into her armpit and left shoulder. This pain restricted the claimant’s range of motion in her left shoulder. Shoulder injuries under Kansas workers compensation law as it existed at that time were whole body injuries under K.S.A. 44-510e. The claimant was awarded a 95 percent permanent partial general body disability for the left arm cut and resulting disability to her left shoulder. Medical evidence identified the pain in the claimant’s armpit and left shoulder as referred pain from her entrapment neuropathy

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<sup>8</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>9</sup> *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

<sup>10</sup> *Bryant v. Excel Corp.*, 239 Kan 688, 722 P.2d 579 (1986).

at the elbow and wrist levels. The Kansas Supreme Court, citing *Fogle*, determined that the situs of the disability determines the level of benefit, not the situs of the trauma. The general body award was affirmed.

In this instance, claimant suffered significant trauma to his left arm below the elbow. Claimant later developed symptoms in the left elbow and shoulder after returning to work for respondent. The medical evidence in this matter supports a finding that the new symptoms in the left upper extremity are the result of claimant's return to work and the repetitive activities associated with that return to work as was determined in the companion case in Docket No. 1,027,953. They are not the result of the amputation. The situs of the trauma and the situs of the disability, in this instance, are one and the same. The determination by the ALJ that claimant suffered a 95 percent functional disability for the amputation to the left forearm is affirmed.

K.S.A. 44-510f(a)(4) states:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.

The Board must next determine whether the limitation contained in K.S.A. 44-510f(a)(4) applies to this matter. The Award of the ALJ allows the compensation to exceed the \$50,000.00 limit set forth in the statute. Respondent contests this finding. Claimant cites *Roberts* in support of his position that the statute does not apply to this circumstance. In *Roberts*, the claimant suffered an injury resulting in an amputation of his right arm 3 inches below the shoulder. He was paid 3.29 weeks of temporary total disability compensation (TTD) for the injury. Both the ALJ and the Board limited the claimant's compensation to the \$50,000.00 statutory maximum. The Court of Appeals determined that the limiting language of the statute applied to situations where functional impairments only were awarded. In *Roberts*, the claimant also received 3.29 weeks of TTD. The Court of Appeals held that the only reasonable interpretation of the statute is that "K.S.A. 44-510f(a)(4) is limited to those few cases in which a claimant does not suffer an injury that causes the claimant to lose at least a week's time from work, but rather causes a 'functional impairment only'".<sup>11</sup> The Court went on to find that where a claimant is also entitled to TTD payments, the \$100,000.00 cap would apply instead.

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<sup>11</sup> *Roberts, supra*, at 611.

*Roberts* appears to be on point with this case. Here, claimant suffered a scheduled injury and was awarded functional disability. However, the parties stipulated that claimant also was paid 4 weeks of TTD for this injury. Therefore, pursuant to *Roberts*, the limitation of K.S.A. 44-510f(a)(4) would not apply.<sup>12</sup> The award of the ALJ is affirmed.

K.A.R. 51-7-8(b)(1)(2)(3) states:

(b) If a healing period of 10% of the schedule or partial schedule is granted, not exceeding 15 weeks, it shall be added to the weeks on the schedule or partial schedule before the following computations are made.

(1) If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows:

(A) deduct the number of weeks of temporary total compensation from the schedule;

(B) multiply the difference by the percent of loss or use to the member; and

(C) multiply the result by the applicable weekly temporary total compensation rate.

(2) If part of a finger, thumb, or toe is amputated, compensation shall be calculated as follows:

(A) multiply the percent of loss, as governed by K.S.A. 1996 Supp. 44-510d, as amended, by the number of weeks on the full schedule for that member;

(B) deduct the temporary total compensation; and

(C) multiply the remainder by the weekly temporary total compensation rate.

(3) If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be amended to award claimant a 100 percent disability to the left forearm. Claimant suffered a 95 percent permanent partial functional disability to his left forearm. The limitation contained in K.S.A. 44-510f(a)(4) does not apply to this matter. However, the above administrative regulation dictates that an amputation is awarded based on the total amount allowed for the member after the number of weeks of temporary total disability compensation paid is deducted.

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<sup>12</sup> *Id.* at 610.



Loss of use under K.A.R. 51-7-8(b)(1)(2) allows for the utilization of the percent of loss of the member. K.A.R. 51-7-8(b)(3) contains no such provision. The regulation appears to require the total amount for the amputated member, minus any temporary total disability paid.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated February 17, 2010, should be, and is hereby, modified to award claimant a 100 percent loss of the left forearm.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Salvador Martinez, and against the self-insured respondent, Cargill Meat Solutions Corporation, for an accidental injury which occurred June 23, 2004, and based upon an average weekly wage of \$885.42.

Claimant is entitled to 4.0 weeks of temporary total disability compensation at the rate of \$440.00 per week totaling \$1,760.00, followed by 196.0 weeks of permanent partial disability compensation at the rate of \$440.00 per week totaling \$86,240.00 for a 100 percent loss of the forearm, making a total award of \$88,000.00. As of the date of this award, the entire amount is due and owing and payable in one lump sum, minus any amounts previously paid.

Although the ALJ's Award approves claimant's contract of employment with his attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.<sup>13</sup>

**IT IS SO ORDERED.**

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<sup>13</sup> K.S.A. 44-536(b).

Dated this \_\_\_\_ day of June, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
D. Shane Bangerter, Attorney for Respondent  
Pamela J. Fuller, Administrative Law Judge